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No. 92-782

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

ROBERT R. & FEROL M. RODRIGUEZ;
FRANKLIN S. CIBULA, A LAW CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION RESTATED

The sole issue in this case is whether a state court judgment against Petitioner Joanne M. Weston and the attachment of a judgment lien against her property within ten days after entry of an order dismissing her Chapter 11 bankruptcy violated the ten day stay against enforcing judgments imposed by Federal Rule of Bankruptcy Procedure 7062.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF CASE

In February 1983 Joanne M. Weston ("Weston") hired Franklin S. Cibula, a Law

Corporation ("Cibula"), as legal counsel to assist her in certain disputes. (A.9) Weston terminated Cibula's employment in December of 1984. (A.9) On February 19, 1985, Cibula served Weston with a Shasta County Municipal Court complaint which sought payment of $11,715.36 of unpaid attorneys' fees. The complaint was served on Weston on February 19, 1985. Shortly before her answer was due, Weston commenced a bankruptcy proceeding in the Eastern District of California (Case No. 285-00957-B-11) on March 15, 1985. (A.9-10)

On January 14, 1986, the bankruptcy court dismissed Weston's bankruptcy petition due to her unreasonable delay in proposing a plan of reorganization. (A.10) Although properly notified of the bankruptcy court's order dismissing her original Chapter 11 case, Weston never

moved for a stay pending appeal as provided for in Federal Rule of Bankruptcy Procedure 8005. On January 15, 1986, Cibula filed for and received a default judgment against Weston in the Shasta County Municipal Court. (A.10) The following day, on January 17, 1986, Cibula obtained a lien on Weston's cause of action in the matter of Joanne M. Weston v. Shasta Terra, Inc., et al., Case No. 352856, Siskiyou County Superior Court, and filed an abstract of judgment in the official records of Siskiyou and Tehema Counties. (A.10)

On January 28, 1986, Weston filed a motion requesting the bankruptcy court to reconsider its order dismissing her original Chapter 11 petition. That motion was denied on February 24, 1986, and Weston thereafter filed an appeal with the Bankruptcy Appellate Panel for the Ninth

Circuit. On May 20, 1988, the Bankruptcy Appellate Panel overturned the bankruptcy court's order. The Bankruptcy Appellate Panel apparently found that the bankruptcy court's dismissal was unauthorized by 11 U.S.C. §1112(b) because the application to dismiss was made by the court's estate administrator rather than by a "party in interest" as required by that section. (A.11)

While the Bankruptcy Appellate Panel had Weston's appeal under submission, on October 27, 1986, Weston filed a second Chapter 11 proceeding in the Eastern District of California (Case No. 286-05445-B-11). (A.26) Therefore, when Cibula obtained a default judgment against Weston and obtained judgment liens against her property, neither the original nor subsequent Chapter 11 proceeding were pending before the bankruptcy court.

SUMMARY OF ARGUMENT

This case does not merit review under any of the standards set forth in this Court's Rule 10.1(a). The sole issue in this case is whether a state court judgment against Petitioner Joanne M. Weston and the attachment of a judgment lien against her property within ten days after entry of an order dismissing her Chapter 11 bankruptcy violated the ten day stay against enforcing judgments imposed by Federal Rule of Bankruptcy Procedure 7062. The Court of Appeals correctly concluded that Federal Rule of Bankruptcy Procedure 7062(a), which incorporates Federal Rule of Civil Procedure 62(a), did not bar Respondent Franklin S. Cibula, a Law Corporation, from obtaining a state court judgment and judgment lien within ten days of the dismissal of the Petitioner's bankruptcy petition. Such a

judgment and judgment lien did not amount to an execution of the dismissal order nor was it a proceeding taken by the bankruptcy court to enforce its dismissal order. Also, 11 U.S.C. §§ 362(c)(2)(B) and 349(b) provide that, upon dismissal of a bankruptcy proceeding, the case is immediately terminated and all parties return to the position they were in immediately prior to the commencement of the bankruptcy.

REASONS TO DENY THE WRIT

THE TEN DAY STAY IMPOSED BY FEDERAL RULE OF BANKRUPTCY PROCEDURE 7062(a) HAS NO APPLICABILITY, IN THE CONTEXT OF THIS CASE, TO AN ORDER DISMISSING A BANKRUPTCY PROCEEDING.

Federal Rule of Bankruptcy Procedure 7062(a) is based upon Federal Rule of Civil Procedure 62(a) which provides in relevant part:

> Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its

> enforcement until the expiration of ten days after its entry . . . .

Federal Rule of Civil Procedure 62(a) stays proceedings to enforce a judgment. "The rule does not govern stays in proceedings other than to enforce a judgment." 11 Wright & Miller, Federal Practice and Procedure, § 2901. The bankruptcy court correctly noted that "such an exception is superfluous in the context of an order dismissing a complaint as such a judgment generally eliminates a cause of action rather than rendering one enforceable." (A.20) When the bankruptcy court dismissed Weston's original Chapter 11 proceeding, Cibula sought no process or writ from the bankruptcy court to enforce or implement the bankruptcy court's order of dismissal. Instead, Cibula simply returned to state court.

Cibula's actions were in accord with

the relevant provisions of the Bankruptcy Code. 11 U.S.C. §362(c)(2)(B) provides that the automatic stay of 11 U.S.C. §362(a) is terminated at the moment an order dismissing a case is entered upon the docket. Federal Rule of Bankruptcy Procedure 9021; Federal Rule of Civil Procedure 58.

Also, 11 U.S.C. §349(b) describes the effect of an order of dismissal. That section provides in relevant part:

> Unless the court, for cause, orders otherwise, dismissal of the case other than under section 742 of this title . . .
>
> (1) reinstates --
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 542, 544, 545, 547,548, 549 or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(k)(1), 542, 550, or 553 of this title;

> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The legislative history of section 349(b) indicates that the basic purpose of this section was to "undo the bankruptcy case, as far as practicable, and restore all property rights to the position in which they were found at the commencement of the case." (H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 337-38 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 48-49 (1978)).

The result reached by the bankruptcy court in this case is identical to the result in In re Saez, 721 F.2d 848 (1st Cir. 1983). In Saez, the First Circuit considered the issue of whether dismissal of a Chapter 13 petition was automatically stayed for ten days. In that case, the bankruptcy court had entered an order

dismissing the debtor's Chapter 13 petition for "failure to prosecute" the bankruptcy. Within ten days of the dismissal, a creditor conducted a foreclosure sale of the debtor's residence.

The bankruptcy court in Saez later granted a motion for reconsideration and held that, although the automatic stay ceased to protect the debtor upon dismissal of the case, the creditors were nonetheless in violation of Bankruptcy Act Rule 762, the predecessor of Federal Rule of Bankruptcy Procedure 7062, because the foreclosure of the debtor's property occurred within ten days of the order dismissing the case. In re Saez, 13 B.R. 605, 606-607 (Bankr. D.P.R. 1981). The bankruptcy court concluded, therefore, that the sale of the debtor's property was null and void.

On appeal, the First Circuit reversed the bankruptcy court. The First Circuit found that Rule 762 did not apply to an order dismissing a case for failure to diligently prosecute the bankruptcy case. In reaching this conclusion, the First Circuit reasoned that although Rule 762 applied in adversary proceedings as well as to "all proceedings relating to a contested petition and in all proceedings to vacate an adjudication", an order to dismiss for failure to prosecute did not qualify as either. Consequently, the First Circuit found that Rule 762 did not govern an order entered upon a motion to dismiss for failure to prosecute. In re Saez, supra, 721 F.2d at 852; see also, In the Matter of Bluford, 40 B.R. 640 (Bankr. W.D. Mo. 1984); In re Barnes, 119 B.R. 552, 555 (D.C.S.D. Ohio 1988).

CONCLUSION

It is respectfully submitted that the court should not exercise its discretionary jurisdiction in this case. This case involves a straightforward application of Federal Rule of Bankruptcy Procedure 7062 and Federal Rule of Civil Procedure 62(a). These rules have no applicability in the context of this case. In this case, Weston's bankruptcy petition was dismissed and Cibula returned to state court in order to exercise his state court remedies. The bankruptcy court was not called upon to issue a writ of execution, commence any proceeding, or otherwise enforce its order of dismissal. The right of Cibula to return to state court once the bankruptcy was dismissed is recognized by 11 U.S.C. §362(c)(2)(B) and 11 U.S.C. §349(b).

Certiorari should be denied.

Dated: December 1, 1992

Respectfully submitted,

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